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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF GENERAL COUNSEL

memorandum

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

TO: William F. Caton
Secretary

FROM: Joel Kaufman JK

SUBJECT: Ex Parte--Docket MM 92-266

DATE: March 15, 1996

Attached is an ex parte faxed letter that was sent to me yesterday just before the sunshine period went into effect in this rulemaking proceeding. There is no indication on the document that copies were filed with your office. Accordingly, I am attaching the ex parte so that it may be placed in the record.

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Mar. 14. 1996 10:16AM DISCOVERY COMM

MM Docket 92-266
CLA 96019

Facsimile Cover Sheet

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DELIVER IMMEDIATELY

To: Joel Kaufman
Company: Office of General Counsel
Phone: 202.418.1700
Fax: 1.202.418.2822

From: Anne C. Lamoureux
Company: Discovery Communications, Inc.
Phone: 301.986.0444 x5207
Fax: 301.986.4971

Date: March 14 1996
Pages including this cover page: 4

Comments: Please deliver as soon as possible. Thank you.

DISCOVERY COMMUNICATIONS, INC.

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JOHN S. HENDRICKS
Chairman and
Chief Executive Officer

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OFFICE OF SECRETARY

March 12, 1996

Mr. Joel Kaufman
Office of General Counsel
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Mr. Right:

It has come to our attention that the Commission is considering modifying its leased access rates formula such that the permitted rates for commercial leased access may fall well below the marketplace value of cable channels. Given the current scarcity of available channel capacity, this change in policy could adversely affect continued carriage rights of existing programming services such as The Learning Channel, and altogether eliminate the opportunity for carriage of new programming networks. These consequences are especially troubling to Discovery in light of our current plans to launch several new, educationally-oriented program services. We believe that the matter is of sufficient importance to warrant the Commission's attention to and consideration of the current needs of all interested parties, not just the potential channel lessees, prior to the implementation of such dramatic modifications.

The relevant provision of the Communications Act Section 612,(c)(1), directs the Commission to establish rates for leased access use that are "at least sufficient to assure that such use will not adversely affect the operation, financial condition or market development of the cable system." Because the cable system's most valuable asset is its channel capacity, it is critically important that the Commission establish rates for leased access that maximize the cable operator's ability to allocate its capacity to provide valued programming to its customers while still achieving the congressional objective of making a *commercially reasonable* amount of leased access available.

As a programmer, Discovery's most significant challenge is to convince distributors that carriage of our products will significantly enhance the value of their service to the customer. In recent years, however, our efforts have been hampered by two factors: the absence of incentives available to cable system operators to add new channels and the scarcity of available channel space, particularly given the effect of the must carry and PEG obligations. As we understand it, the reported changes that the Commission is considering for leased access rates could make these obstacles even greater for programmers like Discovery to overcome.

Since the enactment of the 1992 Cable Act, Discovery has worked with the Commission to restore natural marketplace incentives for the addition of new programming services. Clearly, the "going forward" rules worked to that end by providing necessary and appreciated relief, however, most of those rate incentives have been utilized. Again, it appears that cable operators may have to revert to basing channel line-up decisions on regulatory issues and license fee and revenue calculations rather than on content and audience appeal. Sheer economics favor capacity allocation decisions that would fill channels with low cost, revenue-producing programming such as home shopping, pay-per-view and infomercials rather than educational programming or even traditional, ad-supported entertainment networks.

As a result, vacant cable channels are at a premium today leading to intense competition among programmers. Lower-than-market leased access rates will unfairly skew the system in favor of many programmer/lessees that have demonstrated neither the ability nor the commitment to make the necessary investment in quality programming.

Programmers like Discovery, who have built an audience base by making major investments in programming, are concerned that services such as The Learning Channel will be displaced from existing channels, and that new services, such as the educational services Discovery is proposing, will face even greater difficulty securing space.

The course the Commission reportedly is contemplating will result in the disruption of channel line-ups and will endanger planned launches of new program services that are not based on the leased-access model. This will adversely affect the operation, financial condition and market development of cable systems, as well as programmers like

Discovery. Since the Commission's reconsideration of this issue commenced in 1993, there have been many changes in the video marketplace, not the least of which are those being brought about by the Telecommunications Act. These changes must be taken into account in any permanent modification of the current leased access regulatory scheme. Therefore, we respectfully urge the Commission to refrain from adopting such significant modifications to the leased access rate formula without the benefit of full comment, albeit expedited, by all affected parties.

As always, we appreciate the opportunity to express our views on this matter of serious concern to programmers. Please do not hesitate to contact me directly should you have any questions or comments. Additionally, representatives from Discovery have arranged meetings with your staff so that we may provide comprehensive and timely insight into the effect that these matters may have on our company.

Sincerely yours,

John S. Hendricks